

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Griffin, P.J., Hood and Sawyer, J.J.

NATIONAL WILDLIFE FEDERATION; UPPER
PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiff-Appellee,

Supreme Court No. 121890

v

CLEVELAND CLIFFS IRON COMPANY; EMPIRE
IRON MINING PARTNERSHIP,

Defendant-Appellant,

Court of Appeals No. 232706

Marquette County Circuit Court
No. 00-037979-CE

and

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, a Michigan
executive agency, and RUSSELL J HARDING,
Director of Michigan Department of Environmental
Quality,

Defendant-Appellee.

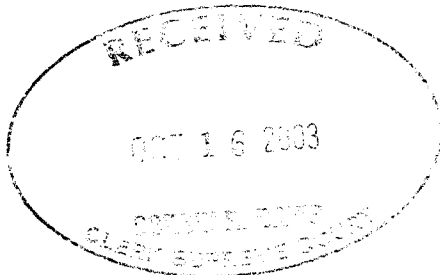
BRIEF ON APPEAL - APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

- I. CAN THE LEGISLATURE BY STATUTE CONFER STANDING ON A PARTY WHO DOES NOT SATISFY THE JUDICIAL TEST FOR STANDING, WHERE THE LEGISLATURE ACTS IN FULFILLMENT OF ITS MANDATE UNDER ART 4 § 52 OF THE 1963 CONSTITUTION AND DETERMINES IT IS NECESSARY IN ORDER TO RECOGNIZE AND PROTECT THE PARAMOUNT PUBLIC INTEREST IN THE NATURAL RESOURCES OF THE STATE?**
- II. DOES THE INJURY IN FACT PRONG OF THE JUDICIAL TEST FOR STANDING ALLOW A COURT TO THWART LEGISLATIVE RECOGNITION OF NEW OR EXPANDED RIGHTS AND CAUSES OF ACTION?**
- III. HAS THE JUDICIAL TEST FOR STANDING EVOLVED IN SUCH A WAY AS TO ALLOW FOR BROAD STANDING FOR CITIZEN SUITS TO BRING ENVIRONMENTAL AND OTHER PUBLIC LAW CLAIMS?**

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

This case presents the question of whether the Legislature may confer standing to a person that would not have standing under the judicial test adopted by this Court in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 737; 629 NW2d 900 (2001). It arises in the context of National Wildlife Federation's (NWF) attempt to bring suit pursuant to the "Michigan Environmental Protection Act" (MEPA) now Part 17 of the Natural Resources and Environmental Protection Act (NREPA) MCL 324.1701 *et seq.*, and that act's express grant of standing to "any person."

Defendant-Appellant Cleveland Cliffs Iron/Empire Mining Partnership's (CCI) Statement of Proceedings and Facts is accurate but incomplete in that it does not fully set forth the role and position of the Michigan Department of Environmental Quality (MDEQ), its codefendant and now an Appellee in this case.

MDEQ was made a defendant in this case since it issued an environmental permit to CCI to expand its mining operations. (Appellant's Appendix, pp 107a-110a) When NWF brought this MEPA action in the Marquette Circuit Court, it had already invoked administrative review under the substantive permitting statutes, and MDEQ was prepared to defend its permitting decision in the context of those administrative proceedings. (Tr 1/5/01, p 36)

In the Marquette Circuit Court, MDEQ argued that NWF had standing to bring the suit, and that the real issue facing the court was whether that NWF had satisfied the requirements for temporary injunctive relief. (Tr 1/5/01, pp 305-309) On this question, MDEQ took no position. It also pointed out to the court that administrative proceedings had been initiated, and that the court could keep jurisdiction to review the outcome of those proceedings. *Id.*

The Circuit Court dismissed the MEPA suit for "lack of standing" rather than failure to meet the requirements to obtain injunctive relief, although the Court was unclear why it

concluded that plaintiffs lacked standing. In addressing standing, the Circuit Court expressed dissatisfaction with the affidavits submitted:

I'm not going to take the time to go through the affidavits one by one, but I think that anybody who reads them will see how often the words or the phrases "I am concerned" without any stated basis in those affidavits for the reason for being concerned. I am concerned that there will be an impact. I am concerned there won't be as many birds. I am concerned that there has been a diminishment of the fishery in Goose Lake, and I'm concerned that the mining activities will further diminish the fishery. That's not enough.

The affidavits in this situation do not give or do not demonstrate that the individuals have standing, as least not to this Court. And, consequently, that standing cannot be passed on, so to speak, to the two organization plaintiffs. (Tr 1/5/01, p 325)

The Court also determined that plaintiffs had not made a prima facie showing that the conduct of the defendant has polluted, impaired or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in those resources. *Id.* Then, addressing the elements required for a preliminary injunction, the Court found that plaintiffs would suffer irreparable injury of a minor nature:

I think that there will be some irreparable injury, but I think that based on the proofs that I heard that irreparable injury will be of a very minor nature. . . [T]here really hasn't been any demonstration that the irreparable injury will be of such importance and severity that we are going to lose an endangered species, which the Court would find would be a much more serious situation. (Tr 1/5/01, p 326-327)

NWF appealed that decision to the Court of Appeals, asserting standing both under the "traditional test" for standing and the broad grant of standing under MEPA. In the Court of Appeals, MDEQ filed its brief to indicate its view that MEPA does indeed confer standing to any person alleging that the conduct of the defendant is likely to pollute, impair or destroy the natural resources of the State, and therefore supported NWF's position.

MDEQ addresses this Court as an Appellee, having taken the position it did in the Court of Appeals and having opposed CCI's Application for Leave to Appeal.

INTRODUCTION

This case arises because defendant Cleveland Cliffs challenges the plaintiff National Wildlife Federation's standing under the Michigan Environmental Protection Act (MEPA.) On its face MEPA, at MCL 324.1701 broadly grants standing to all persons to:

"maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

MEPA was originally adopted in 1970 as Public Act 127, and is now Part 17 of the Natural Resources and Environmental Protection Act, MCL 324.1701 *et seq.* MEPA has a long tradition in Michigan as the keystone of its environmental protection laws. Professor Joseph Sax eloquently explained the underlying concept of MEPA, the statute which he drafted, as follows:

More than anything else, the Act has instilled in ordinary citizens a confidence that it is possible for them to have their day in court--in the fullest meaning of that phrase. Too often students of the administrative process forget that behind the formal cases are always human problems. To some official, a new highway may be another link in a grandiose transportation network; to the individual in its path, it is a swath dividing the neighborhood in which he has chosen to live and to raise his children. A small trout stream or scenic woodland that is only an impediment to large-scale planners is often a special source of joy and refreshment to those who come back to it season after season seeking repose.

These values, unpretentious as they are, lie deep in the hearts of many of our citizens, people who are unable to support representatives in the capital or to buy slick advertising in the mass media. These are the people to whom the EPA speaks. And, as we have seen, it is they who have most often used the Act. They have not always prevailed, but they have had ample opportunity to be heard; and in almost every instance, they have received fair and intelligent treatment by the courts. Joseph L. Sax and Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1080-1081 (1972).

MEPA was passed to fulfill the legislature's obligations under the directive of 1963 Const art 4, § 52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and

general welfare of the people. *The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.* (Emphasis supplied.)

The Court of Appeals below recognized that MEPA statutorily confers standing on plaintiffs such as NWF, an environmental protection group with a recognized reputation for environmental advocacy on behalf of its members: "In light of the plain language of the statute and its consistent construction conferring standing to any person, we decline defendants' invitation to read in an additional requirement of compliance with non-statutory standing prerequisites." [June 11, 2002 Court of Appeals Opinion, p 2]

The Supreme Court granted leave in this case, broadly framing the issue: "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing."

In the context of this specific case, the DEQ views the essential question as whether MEPA can constitutionally confer standing on all persons claiming that specific conduct of a defendant is causing or likely to cause pollution, impairment or destruction of the state's natural resources or harms to the public trust in those resources. Thus, MEPA is more properly viewed as substantively vesting each citizen with a legally cognizable interest in the natural resources of the State.

MEPA is fundamentally consistent with traditional tests courts have used to determine standing, since it essentially recognizes that all persons are legally injured by the impairment of public trust resources. Additionally, the broad grant of authority to the Legislature under art 4, § 52 constitutes sufficient constitutional authority for the Legislature to grant standing to persons who do not meet the "judicial test" for standing. Finally, a review of the legal precedent, and the historical materials, establishes that the Legislature does have authority to "abrogate" the Court's traditional tests for standing, where, there is a constitutional mandate to provide for the

protection of a "paramount public concern," and where the Legislature vests in citizens new legal interests and provides a means for enforcing those legal interests.

ARGUMENT

I. The Michigan Legislature May Grant Standing To Persons Who Do Not Meet the "Judicial Test" for Standing Recently Adopted by The Supreme Court.

A. Standard of Review

The existence of standing is a legal question. Questions of law are subject to de novo review. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000); *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 737; 629 NW2d 900 (2001).

B. Standing In General

"Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the complexities and vagaries that inhere in justiciability." *Flast v Cohen*, 392 US 83, 98-99; 88 S Ct 1942; 20 L Ed 2d 947 (1968). Justiciability is simply the question of whether a matter is properly before a court, and is often considered in the context of the proper use of judicial resources. If the matter does not involve a "genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it." *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993). Thus courts will generally not take up a case unless it is presented by a party with a genuine interest in the outcome, the issues are ripe for review, and they are not moot.

Another underlying concern has been for the proper role of courts in the constitutional framework of separation of powers. Thus, the courts have refused to take up "political questions" that set forth generalized, widely shared grievances the remedy for which would be more properly pursued in the political process rather than the courts. *Coleman v Miller*, 307 US 433, 450, 454-455; 59 S Ct 972; 83 L Ed 1385 (1939); *Baker v Carr*, 369 US 186, 210-211; 82 S

Ct 691; 7 L Ed 2d 663 (1962); *Nixon v United States*, 506 US 224, 228; 113 S Ct 732; 122 L Ed 2d 1 (1993).

Unlike other justiciability considerations, standing focuses not upon the claim itself, but upon the party bringing the claim. "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v Morton*, 405 US 727, 731-732; 925 S Ct 1361; 31 L Ed 2d 636 (1972).

Or, as stated in *Baker v Carr*, *supra*, 369 US at 204, the relevant inquiry is:

Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

In the federal courts, standing analysis is based on the underpinning of the "case or controversy" requirement of US Const, art III, § 2. *Baker v Carr supra*; *Lujan v Defenders of Wildlife*, 504 US 555, 560; 112 S Ct 2130; 119 L Ed 2d 351 (1992); *Friends of the Earth v Laidlaw*, 528 US 167, 180; 120 S Ct 693; 145 L Ed 2d 610 (2000). Beyond the constitutional inquiry, the courts have also employed "prudential" considerations to assure that they adhere to the "proper - and properly limited - role of courts in a democratic society." *Warth v Seldin*, 422 US 490, 498; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

The US Supreme Court's analysis of standing has evolved considerably over the course of the past century. Whereas the Court had formerly relied predominantly on its prudential discretion to examine individual cases and assure that they were capable of falling within Article III constraints, *Flast, supra*; *Baker, supra*, in more recent times it has tended toward more rigid "constitutionalized" standing, with uniform tests to be applied in all cases to assure that they

meet Article III "case or controversy" requirements.¹

This constitutionalization of justiciability questions led to the currently enunciated test for federal standing as set forth in *Lujan v Defenders of Wildlife*, *supra*, 504 US at 560-561:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] some party not before the court. Third, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." (Internal citations omitted.)

This has become the established statement of the test for federal standing.

C. Standing in Michigan is Not Constrained by Federal Constitutional "Case or Controversy" Doctrine.

State courts are not bound by federal standing requirements. The United States Supreme Court has stated: "state courts need not impose the same standing or remedial requirements that govern federal-court proceedings. The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis." *Los Angeles v Lyons*, 461 US 95, 113; 103 S Ct 1660; 75 L Ed 2d 675 (1983).

We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute. *ASARCO, Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989) (citations omitted).

Professor Laurence Tribe has observed with regard to federal claims in state courts:

¹ For more detailed examinations of the evolution of federal standing considerations, both pre- and post-*Lujan*, see: Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L Rev 163, 171-198 (1992); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 Cal L Rev 315, 318-332 (2001).

[S]tate courts, if consistent with their own constitutions, may hear the federal claims of litigants who would not have standing to adjudicate them in federal court. This reflects the conclusion that federal standing requirements, whether dictated by article III or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and its special role and are therefore irrelevant to the question of what more generous standing rules a state may adopt if it chooses to do so. Tribe, *American Constitutional Law* (2d ed 1988), pp 112-113.

The Michigan Supreme Court has itself recognized that it is not bound by federal law on the question, there being no "case or controversy" limitation in the Michigan Constitution:

Although this Court is not bound to follow federal cases regarding standing, n20 we agree that [*American Federation of Government Employees v] Pierce* [225 US App DC 61; 697 F 2d 303 (1982)] lends support at least for the standing claim of plaintiff Jacobetti as a member of the House Appropriations Committee.

* * *

n 20. One notable distinction between federal and state standing analysis is the power of this Court to issue advisory opinions. Const 1963, art 3, § 8. Under Article III of the federal constitution, federal courts may issue opinions only where there is an actual case or controversy. *House Speaker v State Administrative Board*, 441 Mich 547, 559-560; 495 NW2d 539 (1993).

Michigan courts derive their powers from Const 1963 art 6, § 1, which provides that "[t]he judicial power of the state is vested in one court of justice, which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court..." The Constitution does not further define the "judicial power" that is conveyed, but other constitutional provisions are instructive.

Const 1963 art 6, § 13 conveys very broad original jurisdiction:

The circuit court shall have original jurisdiction in *all matters not prohibited by law*; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; *power to issue, hear, and determine prerogative and remedial writs*,^[2] supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with the rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court. (Emphasis supplied.)

² A power not granted to the federal courts by US Const art III.

As noted in *House Speaker, supra*, at n 20, Const 1963 art 3, § 8 empowers the Court to render advisory opinions on legislation before it takes effect, a situation that involves no case or controversy.

This Court trenchantly explained the difference between state and federal judicial authority to entertain actions in *Washington-Detroit Theater Co v Moore*, 249 Mich 673; 229 NW 618 (1930), a case construing the former declaratory action statute. The Court examined the defendant's argument that declaratory judgments do not represent "cases" or "controversies" to which federal jurisdiction would extend and held, 249 Mich at 680-681:

This historical argument, however much it may circumscribe a government of granted powers, is not applicable to a sovereign State whose inherent powers enable it to attempt solution of any social problem arising from current conditions, and which may adventure into experiment for the public welfare.

While the legislature obtains legislative power and the courts receive judicial power by grant in the State Constitution, *the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument*. There is no constitutional restriction on the power of the legislature to recognize the complexity of modern affairs and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wronging or threatening to wrong the other. There is no constitutional expression of limitation upon the power of the court to decide such disputes. In the *Anway* Case, Mr. Justice SHARPE collected the definitions of judicial power and they need not be repeated here. When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is res adjudicata of the issue in any other proceeding in court in which it may be involved, what else can the decision be but the exercise of judicial power? (Emphasis supplied.)³

Thus it is clear that Michigan courts are not constitutionally required to follow the federal

³ In fact, declaratory relief is one of the remedies made available by the statute in question in this case. MCL 324.1701 (1): " The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief..."

standing cases. This view is echoed throughout other states' jurisprudence: Hawaii (*Hawaii v Fields*, 67 Haw 268, 274; 686 P2d 1379 (1984)); Illinois (*People v \$1,124,905 U.S. Currency*, 177 Ill 2d 314, 328; 685 NE2d 1370 (1997) ("In Illinois, standing is part of the common law."); New Jersey (*Salono v Glaser*, 82 NJ 482, 491; 414 A2d 943 (1980) ("In cases of great public interest, any slight additional private interest will be sufficient to afford standing."); New York (*Suffolk Housing Services v Town of Brookhaven*, 91 Misc 2d 80, 87-88; 397 NYS2d 302 (1977)); Ohio (*Cincinnati City School Dist v State Bd of Ed*, 113 Ohio App 3d 305, 313; 680 NE2d 1062 (1996) ("Nevertheless in deciding issues of standing in the courts of Ohio, the Ohio Supreme Court relies on federal court decisions."); Pennsylvania (*In re Appeal of Hickson*, 821 A2d 1238, 1243 (Pa, 2003) ("While it is not constitutionally compelled, our standing doctrine nonetheless has a long, venerable history as a useful tool in regulating litigation", citing *Appeal of Lansdowne Borough Bd of Adjustment*, 313 Pa 523; 170 A 867 (1934)); Utah (*Utah v Thurman*, 846 P2d 1256, 1267; 203 Utah Adv Rep 18 (1993) (citing *Provo City Corp v Willden*, 768 P2d 455 (Utah, 1989)).

Nevertheless, in articulating the prudential goal of taking up only justiciable claims, and its caution regarding the constitutional separation of powers (discussed *infra* at I.F.), the Michigan Supreme Court has developed standing "on a track parallel to the federal doctrine..." *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 737; 629 NW2d 900 (2001). In this regard, it may be said that, like Ohio (see *Cincinnati City School Dist v State Bd of Ed*, *supra*), Michigan has chosen to develop its prudential common law of standing by reference to the federal cases. Thus, this Court in *Lee*, 464 Mich at 739, expressly endorsed and adopted the "judicial test" for standing set forth in *Lujan*:

In our view, the *Lujan* test has the virtue of articulating clear criteria and of establishing the burden of demonstrating these elements. Moreover, its three elements appear to us to be fundamental to standing; the United States Supreme

Court described them as establishing the "irreducible constitutional minimum of standing." We agree.

In a concurring opinion, *Id* at 743, Justice Weaver took issue with the blanket adoption of the *Lujan* standard, observing:

Unlike constitutional cases in federal courts, the Michigan standing requirements have been based on prudential, rather than constitutional, concerns. See, generally, *House Speaker v State Administrative Bd*, 441 Mich. 547, 559, n.20; 495 N.W.2d 539 (1993), and Justice RILEY's dissent in *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich. 629; 537 N.W.2d 436 (1995). Both this Court and the United States Supreme Court have recognized that we are not required to comply with the federal rules regarding standing.

Appellee MDEQ agrees with Justice Weaver that, where concerns of standing arise, the test is prudential rather than constitutional.

D. Standing in Michigan is Prudential And May Be Overridden by the Legislature.

1. Separation of Powers Is Not So Complete That the Branches of Government Do Not Have Limited Control Over One Another.

The only constitutional provision that arguably implicates the Michigan courts' ability to hear cases, and the one relied upon by Appellant CCI, is Const 1963 art 3, § 2:

The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

To be sure, this separation of powers concern has been prominent in this Court's standing cases. For example in *Lee*, at 737:

In Michigan, standing has developed on a track parallel to the federal doctrine, albeit by way of an additional constitutional underpinning. In addition to Const 1963, art 6, § 1, which vests the state "judicial power" in the courts, Const 1963, art 3, § 2 expressly directs that the powers of the legislature, the executive, and the judiciary be separate. Concern for the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches.

And see the discussion and citations following, *Id*, at 737-738.

Separation of powers is one of the cornerstones of our republic, and was foremost in the considerations and deliberations of the founders. It is also beyond debate that complete separation was avoided in favor of a system of limited checks and balances. James Madison commented on this subject throughout the Federalist Papers, Nos. 47 - 51.⁴

In The Federalist No. 47: *The Particular Structure of the New Government and the Distribution of Power Among Its Parts*, Madison wrote:

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept of the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

* * *

[A brief examination of the features of the British constitution is given.]

* * *

From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. (Emphasis in original.)

⁴ All references to the Federalist Papers contained herein are from, *The Federalist Papers* (Clinton Rossiter ed, 1961)

Madison then examined the constitutions of the several states, remarking that, "notwithstanding the emphatical, and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.*

Citing the Massachusetts constitution and its stark expression of separation of powers,⁵ Madison observed:

This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no further than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. *Id.*

Madison introduced The Federalist No. 48: *These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other* thus:

It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly disconnected with each other. I shall undertake, in the next place, to show that *unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.* (Emphasis supplied.)

In this explication, Madison cited the example of Virginia, quoting Thomas Jefferson from his *Notes of the State of Virginia*:

"An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among the several bodies of

⁵ "[T]he legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."

magistracy as that no one could transcend their legal limits without being checked and restrained by the others." (emphasis in original.)

As a final example, in *The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, Madison wrote:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

* * *

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but expedience has taught mankind the necessity of auxiliary precautions.

Before turning away from the framers' conception of the separation (and mutual limitation) of powers it is worthwhile to examine their attitude toward the judiciary, ("beyond comparison the weakest of the three departments of power.") *The Federalist No. 78*, (Alexander Hamilton) [citing Montesquieu, *Spirit of Laws*, Vol 1, p 186]. In order that it may take its co-equal role alongside the other two more powerful branches, the judiciary must have unquestioned authority to review the enactments of the legislature and the actions of the executive against the backdrop of the Constitution. Alexander Hamilton's observations on the judiciary set forth in the *Federalist Papers*, Nos. 78-83, placed an emphasis on this need for a robust and wholly independent judiciary, capable of effectively restraining the other two branches:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the

reservations of particular rights or privileges would amount to nothing. The Federalist No. 78: *The Judiciary Department*.

The Michigan Courts have routinely accepted the concept that the separation of powers cannot be complete. In *Soap and Detergent Ass'n v NRC*, 415 Mich 728, 751-752; 330 NW2d 346 (1982) this Court, referring to Montesquieu and quoting a portion of The Federalist No. 47 quoted above, wrote: "These principles have been adopted in Michigan. Thus, while art 3, § 2 of the constitution provides for strict separation of power, this has not been interpreted to mean that the branches must be kept wholly separate." See, also, *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296-297; 586 NW2d 894 (1998):

This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers. If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible. (Citations omitted.)

In fact, Michigan law is replete with shared and overlapping authority. Const 1963 art 3, § 8, as noted, authorizes this Court to judge the constitutionality of a statute before it takes effect upon request of either house of the Legislature or the Governor. This is in addition to the Court's inherent judicial authority to declare legislation passed into law unconstitutional, and to compel the executive to comply with the law in cases of actual controversy.

Const 1963 art 4, § 33 addresses veto power of the Governor over legislation, and the Legislature's ability to override such veto. § 37 of the same article concerns legislative oversight of administrative rules, which are authorized in the first instance by the Legislature's delegation of a portion of its lawmaking authority. Const 1963 art 4, § 19 gives the Governor a line item veto over appropriations, and art 5, § 23 provides that the Governor shall fill judicial vacancies. Const 1963 art 11, § 7 confers impeachment authority on the Legislature with the House of Representatives taking on the role of prosecutor and the Senate sitting in judgment.

CCI's Brief on Appeal places all its emphasis on what it characterizes as proper and indispensable separation of powers concerns. The greater part of its argument concentrates on the standing doctrine as "an essential element in ensuring that power of the three branches are separated as is required by Michigan's constitution." (Appellant's Brief on Appeal, Argument B, beginning at p 13.) In fact, Argument B concentrates almost entirely upon federal (i.e., Article III) standing analysis, and in its insistence that this analysis results in the proper treatment of the issue of state law presented here, it quotes much material that is irrelevant to this inquiry and it completely ignores the "checks and balances" concerns of several of the very writers it cites.

For example, James Madison's "notion that the judiciary's power would be limited because its authority was well confined within 'landmarks' that were more certain than those limiting the activities of the other two branches" (Appellant's Brief, p 24, citing *The Federalist* No. 48) is suggested to be the philosophical underpinning of recent Supreme Court rulings increasingly limiting judicial power. In fact, Madison's point was that the judiciary is relatively weak, so that any "projects of usurpation" by it would "immediately betray and defeat themselves;" and, as noted in the quotes from *The Federalist* Nos. 48 and 78 contained in this Brief, *supra*, his and Hamilton's concern was that the judiciary be empowered with sufficient authority to effectively restrain the relatively stronger executive and especially the considerable power of the legislature.

CCI's quote from Robert J. Pushaw in, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L Rev 393, 426-427 (1996) is also out of context: "[C]ourts could not act on their own initiative but only at the request of a party in a public 'judicial' proceeding ... and judges had the authority to expound existing law, not to make new law." (Appellant's Brief pp 15-16) While this quote is hardly arguable, and accurately sets forth prevailing views of judicial power, it has no bearing on the question before this Court, which is

not acting of its own authority and is indeed being asked to explain existing law and not to make new law.

Most striking is the source from which the quote is taken: it comprises 35 words out of a more than 41,000 word article that presents a very strong criticism of modern federal standing doctrine:

During this century, the Court has purported to adhere to the Framers' conception of justiciability and separation of powers but has gradually eviscerated it. The result is a patchwork of justiciability doctrines that are unsound in theory and unworkable in practice.

* * *

The Court's conception of justiciability promotes one traditional purpose of separation of powers – governmental efficiency – but sacrifices its countervailing goals: protecting liberty, guaranteeing the rule of law, and checking and balancing power. The Court has neglected the Founders' idea that federal judges represent the People by remedying the unlawful conduct of political branch officials in both private and public judicial actions. *Id.*, at 454-455.

CCI has advanced a far too rigid and myopic view, more so than its own authorities cited above, of the separation of powers doctrine in its attempt to have this Court "constitutionalize" standing in the Michigan courts. Most importantly to this inquiry, CCI fails to articulate how the separation of powers doctrine is offended by legislative grants of standing. It expresses great solicitude for the integrity of the courts, but fails to show how the role of the judiciary is either usurped or expanded.

By granting the public a cognizable interest in the state's natural resources, and providing them with the means to vindicate that interest through legal action, the Legislature has imposed no duty upon the courts beyond that which they already have: to hear and decide cases.

2. The Legislature Can Grant Standing Beyond The Courts' Prudential Limitations Where It Creates A Legal Right And The Means To Have That Right Reviewed By The Courts.

It is against this background that the issue posed in the Court's Order Granting Leave is reached: "whether the Legislature can by statute confer standing on a party who does not meet the judicial test for standing."

While resolution of this broad constitutional question does not appear necessary to resolve the issues presented in this case, the Defendant-Appellee maintains the legislature may by statute, confer standing on a party who does not meet the judicial test for standing. As shown, standing in Michigan is a prudential consideration whereby the courts may assure that parties bringing actions before them are properly interested in such actions, such that they may render genuine relief, and are not called upon to improvidently spend judicial resources considering generalized claims that are not justiciable or are political questions. In this regard, the Court's use of the term "judicial test" in framing the issue is apt. Standing is not a constitutional issue in Michigan, but rather based on the courts' conclusions as to the various justiciability issues presented by any given case. Note that Const 1963 art 11, § 5 and art 9, § 32 confer standing broadly on citizens to protect certain rights provided in the constitution, and these provisions have never been considered to confer "non-judicial" power on the courts.

Courts decide cases, in very many instances arising out of legislatively created causes of action. The prudential considerations acknowledged above indicate that Michigan courts decide actual cases between interested parties.

When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is res adjudicata of the issue in any other proceeding in court in which it may be involved, what else can the decision be but the exercise of judicial power?" *Washington-Detroit Theater, supra*, 249 Mich at 681.

However, when standing relies on prudential, self-imposed judicial standards, it is within the legislative branch's power to confer a right to adjudicate.

Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. *Warth v Seldin*, 422 US at 500.

See, also, *Bennett v Spear*, 520 US 154, 162; 117 S Ct 1154; 137 L Ed 2d 281 (1997):

Like their constitutional counterparts, these "judicially self-imposed limits on the exercise of federal jurisdiction," *Allen v Wright*, 468 US 737, 751; 83 L Ed 2d 556; 104 S Ct 3315 (1984), are "founded in concern about the proper – and properly limited – role of the courts in a democratic society" *Warth, supra*, at 498; *but unlike their constitutional counterparts, they can be abrogated by Congress*, see 422 US at 501. (Emphasis supplied.)

While insisting that the "injury in fact" test must be met, CCI neglects to acknowledge these two very salient facts: (1) Article III "constitutional standing" does not inhere to Michigan jurisprudence, and (2) in creating a cause of action, the Legislature may create a right to pursue that cause of action, i.e., standing. If the Legislature conveys an interest to some person, or all persons, in the application of one of its laws, that person or those persons may seek to validate that interest in a court of law, and the court will be called upon to do nothing that it does not do in any event: interpret the law to decide the case.⁶

⁶ This is not tantamount to granting to any person the ability to walk in off the street and seek generally to obtain a legal opinion, seek to "enforce the law" or have a political dispute decided. See, e.g. *Linda R.S. v Richard D.*, 410 US 614, 617 n3; 93 S Ct 1146; 35 L Ed 2d 536 (1973): "It is, of course, true that 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions,' . . . But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (Citations omitted.)

The Legislature has authority to enact statutes that abrogate common law. It is not improperly arrogating the powers of another body when it creates a cause of action, for that is, again, what legislatures do. In fact, it will be shown *infra* that in enacting MEPA (with the concurrence of the Governor), now part 17 of the Natural Resources and Environmental Protection Act (NREPA) MCL 324.1701 *et seq.*, the Legislature was fulfilling its constitutional mandate to protect the natural resources of the state from pollution, impairment or destruction. Const 1963 art 4, § 52.

Regarding the particular statute upon which this case is based, this Court has said:

The enactment of [MEPA/Part 17] signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation by individuals or groups of citizens. Not every public agency proved to be diligent and dedicated defenders of the environment. N7 The EPA has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected – the public.

* * *

n7. For those public agencies committed to protecting the environment the EPA has proven to be an invaluable weapon in the fight against the degradation of our environment. See Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1003, 1050-1051 (1972); and Sax and DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 Ecology LQ 1 (1974). *Ray v Mason County Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975).

Courts in other states reviewing statutes similar to or modeled on MEPA have concluded that the statutes themselves recognize an injury to all persons from environmental degradation, and have found standing requirements satisfied by credible allegations of environmental impairment.

Fort Trumbull Conservancy, LLC v Alves, 262 Conn 480, 486; 815 A2d 1188 (2003):

Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy,

with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue.

Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . .

Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation. (Internal quotation marks and citations omitted.)

Florida Wildlife Federation v State Dept of Environmental Regulation, 390 So 2d 64, 66-67 (1980):

We hold that by enacting section 403.412 the legislature created a new cause of action, giving the citizens of Florida new substantive rights not previously possessed. This statute sets out an entirely new cause of action. By providing that the manner in which a potential plaintiff is affected must be set out, the statute ensures that the minimum requirements of standing-injury and interest in redress-will be met.

As a new cause of action, the statute is substantive law. Substantive law has been defined as "that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer." By the enactment of section 403.412(2)(a) the citizens of Florida have been given the capacity to protect their rights to a clean environment-a right not previously afforded them directly. This, then, is the difference between the instant case and *Avila South Condominium Association, Inc. v Kappa Corp.*, 347 So.2d 599 (Fla. 1977), wherein this Court found that the statute under attack there sought to define proper parties rather than to set out substantive rights. The instant statute, however, does not suffer from the same defect. Section 403.412(2)(a) is not an impermissible incursion into this Court's power over practice and procedure in the state's courts.

The district further contends that approval of the statute should not extend to abrogating the special injury rule in this instance. Again, we disagree because the legislature has manifested its intent that that rule of law not apply to suits brought under the EPA.

* * *

If the legislature had meant for the special injury rule to be preserved in the area of environmental protection, it could easily have said so. We presume legislative awareness of the law of public nuisance with its special injury requirement. That the legislature chose to allow citizens to bring an action where an action already existed for those who had special injury persuades us that the legislature did not intend that the special injury rule carry over to suits brought under the EPA.

See also: *Minnesota Public Interest Research Group v White Bear Gun Club*, 257 NW2d 762, 781 (1977):

The Minnesota Environmental Rights Act, Minn.St. c. 116B, a far-reaching legislative enactment, has created, in effect, a right in each person to the preservation and protection of natural resources within the state and has provided a legal remedy for the effectuation of those rights.

People for Environmental Enlightenment and Responsibility (Peer), Inc v Minnesota Environmental Quality Council, 266 NW2d 858, 866 (1978):

The legislature, being aware of the existence of MERA [Minnesota Environmental Rights Act] when it passed the PPSA [Power Plant Siting Act], cannot be assumed to have exempted PPSA from having to comply with MERA without express statutory language to that effect. Since such language is absent, the legislature must have intended to permit private citizens to bring or intervene in civil actions to protect the state's natural resources whenever they think the MEQC has not done so adequately. n6

n6 This conclusion is supported by another principle of statutory construction - that "a statute adopted from another state * * * is presumed to have been taken with the construction there placed upon it." Professor Sax, author of the first draft of the Michigan act upon which MERA is based, noted that the Michigan act "was designed to reduce the range of discretion traditionally given to regulatory agencies and to enable citizens to challenge standards established by those agencies." Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich L Rev 1004, 1064. This suggests that MERA, rather than being preempted by the PPSA, was seen by the legislature as an important mechanism which could be used by citizens to force an administrative agency to protect the state's natural resources. See, Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J.Urbn L. 589, 610.

Following the lead of Michigan, see, e.g., *Michigan State Highway Comm. v Vanderkloot*, 392 Mich. 159; 220 N.W.2d 416 (1974); *Ray v Mason County Drain Commissioner*, 393 Mich. 294; 224 N.W.2d 883 (1975), this court has recognized that MERA provides not only a procedural cause of action for protection of the state's natural resources, but also delineates the substantive environmental rights, duties, and functions of those subject to the Act. Although respondents would limit this substantive cause of action to those situations in which no other environmental legislation exists, their reasons for doing so are not persuasive. MERA is clearly broader than the PPSA because MERA recognizes a right in each citizen to bring a civil suit, while under § 116C.65 of the PPSA, only a utility, a party, or a person aggrieved can appeal a decision of the MEQC to the district court. Furthermore, respondents have not demonstrated any reason to so limit MERA in the absence of express legislative direction. The need for citizen vigilance exists whether or not specific environmental legislation applies, and MERA is clearly a proper mechanism to force an administrative agency, even the MEQC, to consider environmental values that it might have overlooked. (Internal citations omitted.)

3. The Courts Have Authority To Review Executive Action Or Inaction For Compliance With Legislative Mandates.

CCI suggests that in granting standing to all persons, the Legislature has violated the separation of powers by encroaching upon the executive branch's constitutional duty to take care that the law is enforced.⁷ This is a rather attenuated argument, apparently gleaned from Justice Scalia's observation in *Lujan*, 504 US at 577:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.

There are several internal inconsistencies in this argument. See, Cass R. Sunstein, *Correspondence, Article II Revisionism*, 92 Mich L Rev 131 (1993). One is that it is agreed that a party having an individuated interest is not barred by Article II to bring suit, even when he or she is a beneficiary of a regulatory program seeking enforcement of the law, i.e., when the executive is not "taking care" to enforce the law to the detriment of that person's interest.

⁷ Mich Const 1963 art 5, § 8 states, in part: "The governor shall take care that the laws are faithfully executed."

Northeastern Florida Ass'n of Gen Contractors v Jacksonville, 508 US 656, 668; 113 S Ct 297; 124 L Ed 2d 586 (1994). "If suits against the executive by people with individuated interests do not violate Article II - as everyone agrees - it is hard to see why the same suits violate Article II merely because of the absence of an individuated interest." Sunstein, 92 Mich L Rev, at 136.

Also, does this suggest that the "take care clause" gives the executive the discretion to not comply with the law at its will? Professor Pushaw contends that the take care clauses grant not discretionary authority, but rather responsibility to enforce the law as written, and as it is in society's interest to see to it that the law is enforced, it is within the legislature's authority to grant rights, and the courts' duty to review executive action or inaction. "[J]udicial review legitimately stops the President from sabotaging the legislature's policy choices." Pushaw, 81 Cornell L Rev 393 at 484.

To come to terms with this claim, it is necessary to see what exactly the court will decide and what will be at stake. If the citizen suit is to go forward, the question for judicial decision is whether the relevant agency has violated federal law in circumstances in which the law dictates action of a certain kind. The court has no authority to issue a judgment because of a policy disagreement; it must find illegality. If the agency has violated the law, the court will so hold and issue an appropriate decree. The question is this: Why, precisely, do such suits raise an Article II issue?

The problem does not arise under the "Take Care" Clause. By hypothesis, the President will win in court if he has "taken care" and lose only if he violated that duty. It is not so easy to see why the "Take Care" Clause forbids courts from ordering the President to carry out the law. * * * Again: if Article II allows courts to interfere with law implementation by ordering the President to "take care" at the behest of a plaintiff with an individuated injury, why does Article II offer a freestanding objection to such an order at the behest of a citizen? No good reason comes to mind. Sunstein, 92 Mich L Rev at 137.

It would be better said that the executive branch is aided in its law enforcement role insofar as enforcement of Part 17 can only be enhanced by the Legislature's granting a statutory cause of action and the right to bring that action before the courts (i.e., standing) to private individuals.

Perhaps CCI really means to suggest that universal standing inappropriately prevents the executive from failing to perform its duty to comply with the law. This is a curious proposition to be sure, and Appellee's research on the issue finds only two Michigan case references to Const 1963 art 5, § 8, one of which discussed the "take care clause" albeit in a completely different context. *Morris v Governor of Michigan*, 214 Mich App 604; 543 NW2d 363 (1995). In fact, under Michigan law, judicial review of executive branch decisions is, in certain contexts, mandated. Note that Const 1963 art 6, § 28 gives the legislature broad power to subject executive branch "judicial" or "quasi-judicial" decisions to judicial review and establishes a *minimum* standard for review of such decisions:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

It is inherently within the authority of the Michigan Legislature, as granted to it by the sovereign people in the Michigan Constitution to pass laws that create causes of action, and to create and grant rights to citizens to pursue those actions. When a person who is granted such right seeks to enforce it against threat by any other person, including an executive agency of the state, it is within the constitutional authority, indeed the responsibility, of the judiciary to consider the action and to interpret and pronounce the law as it relates to the asserted violation. This is not a violation of the separation of powers doctrine, nor does it constrain the courts from exercising prudential justiciability considerations beyond standing. There must still be an actual controversy, ripe for review and not moot. The Legislature will merely have decided who has the right to seek relief.

E. MEPA Falls Under the Broad Constitutional Mandate Contained in Const 1963, Art 4, § 52 Requiring the Legislature to Provide for the Protection of the Natural Resources of the State From Pollution, Impairment or Destruction and the Public Interest Therein.

Const 1963 art 4, § 52 states:

The conservation and development of the natural resources of the state are hereby declared to be matters of primary public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

This is one of several directives by the people to the Legislature, through the 1963 Constitution, to create specific laws.⁸

In ratifying Const 1963 art 4, § 52, the people of Michigan reserved to themselves an interest in the protection of the state's environment as a "matter[] of primary public concern in the interest of the health, safety and general welfare of the people." The people further compelled the Legislature to protect the natural resources comprising Michigan's environment from "pollution, impairment and destruction."

This Court discussed this constitutional charge in *State Highway Comm v Vanderkloot*, 392 Mich 159, 179-180; 220 NW2d 416 (1974):

The threshold question before us is whether the second sentence of art 4, § 52, prescribes a *mandatory* duty or whether it is merely *declaratory*.

Utilizing the primary construction rule of "common understanding", it is clear that the sentence must be read as a mandatory command to the Legislature. Certainly the popular and common understanding of the word "shall" is that it denotes mandatoriness. Where the supporting language is unequivocal, as here, this Court, too, has uniformly held that "shall" is mandatory. (Emphasis in original, footnote and citations omitted.)

⁸ Article 1 § 2 concerning equal protection: "The legislature shall implement this section by appropriate legislation"; Article 4, § 10, concerning conflicts of interests by state officials: "The legislature shall implement this section by appropriate legislation"; Article 9, § 21: "The legislature shall provide by law for the maintenance of uniform accounting systems..."

Thus, we hold that art 4, § 52, created a *mandatory* duty on the part of the Legislature to act to provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. *Id* at 182.

The Legislature was given authority by Michigan's 1963 Constitution to enact MEPA. It was a directive from the people themselves, exercising their sovereignty through the Constitution. "While the legislature obtains legislative power and the courts receive judicial power by grant in the State Constitution, *the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument.*" *Washington-Detroit Theater Co v Moore, supra*, 249 Mich at 229 (emphasis supplied.)

F. Acting Pursuant To Its Constitutional Mandate The Legislature Created A Legally Cognizable Interest in All Persons For the Protection of the Natural Resources of the State From Pollution, Impairment and Destruction, Providing A Statutory Cause of Action and Standing To Protect That Interest.

The 1963 Constitution mandated that the Michigan Legislature act to protect Michigan's environment, beyond merely giving it the authority to do so. *Vanderkloot, supra*. It has also been shown that the state system of conferred power differs from the federal Constitution of limited powers, in that the state's sovereignty confers plenary power on its institutions unless specifically limited in the constitution. *Washington-Detroit Theater, supra*.

The Legislature responded to the mandate of art 4, §52 in a comprehensive way by enacting the Michigan Environmental Protection Act of 1970, now codified as a part of the Natural Resources and Environmental Protection Act as MCL 324.1701, *et seq*. This Court recognized that comprehensive response in *Vanderkloot, supra*:

The chief legislative enactment currently fulfilling the Legislature's duty to protect our natural resources is the Environmental Protection Act of 1970, MCLA 691.1201 *et seq.*; MSA 14.528(201) *et seq*. The [Highway] Commission's brief to this Court asserts EPA's applicability to its actions:

"The Environmental Protection Act of 1970 * * * represents a comprehensive effort on the part of the legislature to preserve, protect and enhance the natural resources so vital to the well being

of this State * * *. The act is broad indeed and applies to state agencies and private individuals, as a reading of section 2 clearly shows * * *. This language does not confine itself to any one narrow area, but applies to any action on the part of any public agency or private entity which has harmed the environment or is likely to do so. This of course includes the planning and construction of the State's highway system and a myriad of other public and private activities." 329 Mich at 183.

The act recognizes the public's interest in a clean, unpolluted environment reserved by the people in the 1963 Constitution, and fashions a cause of action to validate that interest, granting standing to all who share in it. Section 1701 of the act provides:

The attorney general or *any person may maintain an action in the circuit court* having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. MCL 324.1701 (1) (emphasis supplied).

Section 1704(2) allows a circuit court in which a Part 17 action is brought to recognize the availability of administrative review of the plaintiff's claim, and to direct the parties to pursue that remedy:

If administrative, licensing, or other proceedings are required or available to determine the legality of the defendant's conduct, the court may direct the parties to seek relief in such proceedings. Proceedings described in this subsection shall be conducted in accordance with and subject to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. * * * In addition, the court retains jurisdiction of the action pending completion of the action to determine whether adequate protection from pollution, impairment, or destruction is afforded. MCL 324.1704 (2).

Thus a court in which a Part 17 action is brought has the discretion to alleviate its prudential concerns by directing the plaintiff to pursue to completion any administrative remedy available while at the same time preserving the status quo against pollution, impairment or destruction of the resource in question, assuming that the plaintiff makes the requisite showing to obtain temporary injunctive relief. (This was the procedural situation in this case below, as

argued by MDEQ at the trial court; however MDEQ took no position on NWF's case in favor of an injunction.)

This presents an equitable, common sense approach to these cases: the court may defer, if it feels this is proper, to the expertise of an administrative agency that has jurisdiction over the issue, while at the same time preserving the environment from the potential harm alleged, and also preserving its proper review authority over the administrative agency's decision.

Furthermore, Section 1705, MCL 324.1705 provides that in "administrative, licensing, or other proceedings and judicial review of such proceedings, [] the agency or the court may allow the attorney general or any other person to intervene..." Thus, the executive is given the opportunity to intervene and present its own view of the issues.

Ray v Mason County Drain Comm'r, supra, 393 Mich 294, presented itself as a "case of first impression relating to Michigan's world famous Environmental Protection Act." *Id*, 298.

"Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the 'conservation and development of the natural resources of the state * * *.'"

* * *

"The act *provides private individuals and other legal entities with standing* to maintain actions in the circuit courts for declaratory and other relief against anyone "for the protection of the air, water and other natural resources and the public interest therein from pollution, impairment or destruction." *Id*, pp 304-305 (emphasis supplied).

Thus, this Court, in its decision in *Ray*, has already answered the question it set forth in the Order Granting Leave in this case. If "the act provides individuals and other legal entities with standing," it stands to reason that the *Ray* Court accepted the fact that such was within the power of the Legislature.⁹

⁹ "Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." *McEvoy v Sault Ste. Marie*, 136 Mich 172; 98 NW 1006 (1904).

The Court of Appeals has similarly held that MEPA confers standing to private individuals to maintain actions for the protection of the natural resources. *Trout Unlimited, Muskegon River Chapter v White Cloud*, 195 Mich App 343, 349; 489 NW2d 188 (1992).

Further, plaintiffs have standing under §2(1) of the MEPA. As stated earlier, §2(1) provides standing to private parties to bring lawsuits for declaratory and injunctive relief to protect our natural resources.

In *Michigan Coalition of State Employees Unions v Civil Service Comm*, 236 Mich App 96, 107; 600 NW2d 362 (1999), *rev'd on other grounds* 465 Mich 212; 634 NW2d 692 (2001), that Court found in favor of constitutionally derived standing, with the following observation:

Traditionally, private citizens have no standing to vindicate a public wrong or enforce a public right if they are not hurt in any manner differently than the citizenry at large. [Citations omitted.] The civil service amendment, Const 1963, art 11, § 5, does not enforce traditional standing principles because by its very language, it allows any citizen to enjoin a violation of the amendment. Thus, any citizen could have brought this action. Logic dictates that an organization made up of members who would have standing to sue in their individual capacities should have standing to sue for its members. *Trout Unlimited, Muskegon-White River Chapter v White Cloud* [*supra*].

It is important, finally, to distinguish this case, and the question presented, from *Lee v Macomb County, supra*, in which this Court adopted the *Lujan* test as its "judicial test" for standing. In that case and its companion, individuals sued their county boards under the soldiers' relief fund act, MCL 35.21 *et seq.*, alleging that the counties had failed to levy a tax thereunder to establish a veterans' relief fund. In each case it was conceded that the plaintiffs had not actually applied for aid from such funds, and so their claims were not ripe. The act in question did not confer standing as NREPA Part 17 does. It was in that context that this Court reviewed the customary prudential standing considerations, and concluded that the test set forth in *Lujan* as the "irreducible [federal] constitutional minimum for standing," i.e., injury in fact, causation,

and redressability, "has the virtues of articulating clear criteria, and of establishing the burden of demonstrating these elements." 464 Mich at 740.

These may well indeed be clear, workable criteria in employing the Court's prudential, i.e., non-Article III standing considerations in cases where standing is in question. But as has been argued here, the Legislature has the clear authority to grant standing to those for whom it establishes a cause of action under its laws, and in the instant case a constitutional mandate to do so, and the courts should fulfill their constitutional role by exercising their judicial powers to review the case at bar and determine the legal relations of the parties.

II. The Judicial Test For Standing Has Evolved Since *Lujan's* Release, So That It Is Far Less Restrictive To The Initiation Of Public Law Actions.

Although the Court's Order Granting Leave directed the parties to address the issue whether the Legislature could confer standing beyond the "judicial test" for standing, and Appellee MDEQ has done so in the previous portions of this Brief, MDEQ would briefly point out that, as the *Lujan* test is now interpreted, it is less difficult for an advocacy group to state a prima facie case in a public law action.

A. Standard of Review

The existence of standing is a legal question. Questions of law are subject to de novo review. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000); *Lee v Macomb Co Bd of Comm'rs*, *supra*.

B. The Supreme Court Has Recognized Legislative Authority to "Create" the Injury Required Under Article III Analysis.

It has never been disputed under the federal Article III analysis that the legislature could create rights the violation of which would cause "injury in fact."

Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has

alleged such a 'personal stake in the outcome of the controversy,' *Baker v Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, as to ensure the 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. *Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.* *Sierra Club v Morton*, *supra*, 405 U.S. 732 (emphasis supplied).

See also, *id* at fn 3: " * * * But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [citing *Flast v Cohen*, *supra*] is one within the power of Congress to determine. * * * " (Emphasis supplied.)

See also, *Lujan v National Wildlife Federation*, 497 US 871, 882; 110 S Ct 3177; 111 L Ed 2d 695 (1990):

Respondent does not contend that either the FLMPA or NEPA provides a private right of action for violations of its provisions. Rather, respondent claims a right to judicial review under § 10(a) of the APA, which provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.
5 U.S.C. § 702. (Emphasis supplied.)

This principle was recognized by the Supreme Court in the *Lujan v Defenders of Wildlife* case itself: "Nothing in this contradicts the principle that '[t]he injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing.'"" 504 U.S. at 578, *citing Warth v Seldin*, *supra*.

Justice Kennedy wrote in concurrence to emphasize the point:

I also join in Part IV of the Court's opinion with the following observations. As government programs and policies become more complex and farreaching [sic], we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. * * * In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to

a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. 504 US at 580 (Kennedy, concurring).

As shown in Argument I.G. above, this is precisely what the Michigan Legislature has done. Following its constitutional mandate, it has created by section 1701, MCL 324.1701, a legal right to an environment not threatened by pollution, impairment or destruction, based on the "primary public concern in the interest of the health, safety and general welfare of the people" and has granted standing to vindicate that legal right in the circuit court.

C. The Elements of the *Lujan* Standard Have Evolved Since That Case Was Decided.

As noted above, the US Supreme Court's standing analysis has evolved over the past century, proceeding from a more case specific prudential analysis of whether a party had a sufficient stake to present a "case" or "controversy" in sufficiently adversarial fashion, to an increasing "constitutionalizing" of standing that required rigid tests to be applied uniformly in all cases. *United States v Richardson*, 418 US 166; 94 S Ct 2940; 41 L5d 2d 678 (1974); *Lyons*, *supra*. This consolidation of standing into a wholly constitutional inquiry culminated in 1992, in *Lujan v Defenders of Wildlife*, *supra*, in which the Court delineated the three elements of what it termed "the irreducible constitutional minimum of standing":

First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] some party not before the court. Third, it must be "likely" as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." 504 US at 560-561 (internal citations omitted.)

Application of this test in the *Lujan* case led the Court to conclude that groups seeking review of governmental actions under the "citizens' suit" provision of the Endangered Species

Act¹⁰ did not have standing to bring their legislatively created cause of action. The plurality decision overturned the finding of the 8th Circuit Court of Appeals, as it characterized it, "that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, non-instrumental 'right' to have the Executive observe the procedures required by law. We reject this view." *Id.*, at 573.

Whereas previously, Article III standing had been denied to putative plaintiffs seeking redress for broad, generalized claims of governmental wrong-doing based on Constitutional provisions as seen in *Richardson, supra*, or 42 USC § 1983 claims as in *Lyons, supra*, in *Lujan*, the Court stated "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Id.*, at 576.

For the first time in modern Article III analysis, the Court ruled that even though a federal statute sought to bestow standing on a broad category of plaintiffs, the attempted grant of jurisdiction violated the strictures of the case or controversy requirement. A clear statutory expression of authority to "any person" fell before the notoriously amorphous demand for a constitutional case. Gene R. Nichol, *Citizen Suits And The Future Of Standing In The 21st Century: From Lujan To Laidlaw And Beyond: The Impossibility Of Lujan's Project*, 11 Duke Env L & Pol'y F 193, 194 (2001).

Lujan engendered a flurry of commentary on the future of citizen suits and public law,¹¹ virtually all conceding that under the Court's interpretation, citizen suits in environmental and other public law cases would henceforth be constrained to those who could demonstrate a concrete and highly particularized personal injury and near-certain redressability by the relief sought. Gone were the days of "private attorneys general" bringing actions explicitly authorized by Congress to have the laws enforced.

¹⁰ The plaintiffs contended that certain foreign aid grants would have detrimental effects on endangered species in the countries where the aided projects would be performed.

¹¹ Appellee's Lexis search revealed that the case has been cited in nearly 1,200 law review articles to date.

However, in the ensuing decade since the *Lujan* decision, the Court has continued to evolve its interpretation of the three elements of standing, and has issued opinions that signal that the *Lujan* test may not be so insurmountable in the public law context as was first anticipated.

In *Bennett v Spear*, 520 US 154; 117 S Ct 1154; 137 L Ed 2d 281 (1997), ranchers and irrigation districts challenged a US Fish and Wildlife Service biological opinion of the impact of an irrigation project on two endangered species of fish, claiming violations of the Endangered Species Act (ESA). The 9th Circuit Court of Appeals had dismissed the claim for lack of standing, citing the "zone of interests" prudential limitation first employed in *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150; 90 S Ct 827; 25 L Ed 2d 184 (1970).

The Supreme Court reversed. While adhering to the "irreducible constitutional minimum" of standing to confer Article III jurisdiction, the Court held that Congress could "expressly negate" prudential standing doctrine. "The first question in the present case is whether the ESA's citizen suit provision, [] negates the zone of interests test (or, perhaps more accurately expands the zone of interests). We think it does." 520 US at 164.

The opinion is noteworthy for the emphasis the Court placed on the phrase "any person", as well as its recognition of the importance of citizen suits in the environmental context:

The first operative portion of the provision says that "any person" may commence a civil suit" -- an authorization of remarkable breadth when compared with the language Congress ordinarily uses.

* * *

Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general" -- evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a

right of first refusal to pursue the action initially and a right to intervene later. *Id.*, at 164-165.

Although the Court, in a subsequent decision, focused on the redressability element of the *Lujan* test to deny standing to an environmental group claiming wholly past violations of an environmental statute, *Steel Co v Citizens for a Better Environment*, 523 US 83; 118 S Ct 1003; 140 L Ed 2d 210 (1998), that same term it held that a group of voters had standing to bring suit under the Federal Election Campaign Act of 1971 to challenge the Federal Election Commission's refusal to compel a lobbying organization to disclose information. *Federal Election Comm v Akins*, 524 US 11; 118 S Ct 1777; 141 L Ed 2d 10 (1998).

The *Akins* opinion initially rejected the prudential standing limitations urged by the Solicitor General. "Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit." 524 US at 20. The Court then employed an expansive "injury in fact" interpretation to hold that "Congress [has] the constitutional authority to authorize federal courts to adjudicate this lawsuit." *Id.*

Article III, of course, limits Congress' grant of judicial power to "cases" or "controversies." That limitation means that respondents must show, among other things, "injury in fact" -- a requirement that helps assure that courts will not pass upon ... "abstract, intellectual problems," but adjudicate "concrete, living contests between adversaries." In our view, respondents here have suffered a genuine "injury in fact."

The "injury in fact" that respondents have suffered consists of their inability to obtain information -- lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures -- that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. *Id.*, 20-21 (citations omitted).

The Court addressed and distinguished the "generalized grievance" doctrine, holding that if an asserted injury is "concrete, though widely shared, the Court has found 'injury in fact.'"

Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact." See *Public Citizen [v US Dept of Justice]*, 491 U.S. [440] at 449-450 [109 S Ct 2558; 105 L Ed 2d 377 (1989)] ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [their] asserted injury"). Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an "injury in fact." This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. Cf. *Lujan, supra*, at 572; *Shaw v Hunt*, 517 U.S. 899, 905, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996). We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts. *Id* at 24-25.

Finally, the Court turned to the causation and redressability elements of the *Lujan* test and the FEC's argument that it was possible that even if it shared the plaintiffs' view of the law it may exercise its discretion to not require release of the information.

Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. See, e.g., *Abbott Laboratories v Gardner*, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (discussing presumption of reviewability of agency action); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case -- even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason. Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision not to issue its complaint, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact." *Id* at 25 (internal citation omitted).

Akins, then, may be said to have lowered to constitutional bar to standing in public law cases to a considerable extent. Beyond its expansive interpretations of the elements that make up the "irreducible constitutional minimum of standing", the *Akins* decision distinguished the *Richardson* and *Flast* decisions on the basis that those cases turned on the lack of a "logical nexus" between the asserted status of the plaintiffs and the Constitutional provisions sought to be vindicated in those cases. The Court found the "logical nexus" inquiry not relevant in *Akins* because "there is a statute which, as we previously pointed out, [] does seek to protect individuals such as respondents from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities." *Id.*, at 22. Thus, the Court apparently discarded the *Lujan* precept that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." 504 US at 576.

More recently, in *Friends of the Earth v Laidlaw*, 528 US 167, 180-181; 120 S Ct 693; 145 L Ed 2d 610 (2000), the Court further relaxed the austerity of the standing rule announced in *Lujan*.

In *Laidlaw*, environmental groups brought citizen suit actions on behalf of their members under the federal Clean Water Act against the holder of a permit to discharge issued under that act, alleging violations of permit limits and seeking declaratory and injunctive relief as well as civil penalties. The Supreme Court held that the plaintiffs had standing to seek both injunctive relief and civil penalties, and that the case was not rendered moot by the permit holder's coming into compliance absent a showing that the violations could not reasonably be expected to recur.

On the standing question, the Court rejected the respondent Laidlaw's contention that there was no "injury in fact" in that there had been "no demonstrated proof of harm to the environment" from its discharge violations. "The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff." 528 US at 181.

The Court examined the affidavits of the plaintiffs' members describing how the discharges, and their apprehensions about the resulting pollution affected their use and enjoyment of the river. "These sworn statements, as the District Court determined, adequately documented injury in fact." *Id.*, at 183.

[T]he affidavits and testimony presented by FOE in this case assert that *Laidlaw's* discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation*. Nor can the affiants' conditional statements -- that they would use the nearby North Tyger River for recreation if *Laidlaw* were not discharging pollutants into it -- be equated with the speculative "some day" intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*. *Id.* at 183-184.

The Court turned to redressability of the plaintiffs' injury by issuance of injunctive relief, particularly in the context of the discontinuance of the unpermitted discharges. It distinguished *Los Angeles v Lyons*, *supra*, where the Court had held that the plaintiff did not have standing to seek an injunction against the future use of chokeholds by Los Angeles police officers because he could not credibly allege that he faced a realistic threat of future harm, that the reasonableness of his fear of recurrence of the unlawful conduct depended upon its likelihood of taking place, and that his "subjective apprehensions" that such harm could take place was were not enough to support standing. *Lyons*, 461 US at 108, n 8.

Here, in contrast, it is undisputed that *Laidlaw's* unlawful conduct -- discharging pollutants in excess of permit limits -- was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "the reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, *post*, at 3, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact. 528 US at 184-185.

Next, the Court turned to the question of the plaintiffs' standing to seek civil penalties, payable to the United States. It found that the imposition of penalties (in that case in excess of \$500,000.00) was a deterrent to future illegal conduct, and to that extent, redressed plaintiffs' injuries (their reasonable concerns about the pollution of the river and the resultant effect on their recreational and aesthetic enjoyment.)

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct. *Id.*, at 185-186.

Finally, it is worth noting that the Court addressed the unique and untenable position raised in the *Lujan* opinion: that Congress' authorization of citizen suits breached the separation of powers in that they took away from the executive the exclusive responsibility granted by US Const, art II to "take care" that the laws are enforced:

[T]he dissent's broader charge that citizen suits for civil penalties under the Act carry "grave implications for democratic governance," *post*, at 6, seems to us overdrawn. Certainly the federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law. In fact, the Department of Justice has endorsed this citizen suit from the outset, submitting *amicus* briefs in support of FOE in the District Court, the Court of Appeals, and this Court. *Id.*, at 188, n 4.

Shortly after *Laidlaw's* release, Dean Nichol observed: "[I]f *Akins* turned its gaze away from *Lujan*, *Laidlaw* speeded up the process. [The majority] applied very generous notions of injury - seeking to ease access - and remarkably flexible concepts of redressability - in order to lower the threshold of Article III." *Nichol, supra*, 11 Duke Env L & Pol'y F at 197-198.

Thus, even if this Court were to apply the "judicial test" for standing, evolution of the interpretation of the three elements comprising that test undoubtedly leaves the threshold for bringing a suit under NREPA Part 17 eminently achievable. To establish a *prima facie* case, a

plaintiff need only show to a reasonable degree injury to some recreational, economic or aesthetic interest, trace the harm to the asserted actions of the defendant, and again, to a reasonable degree, demonstrate that that interest will be redressed by the relief sought. In the case of Part 17, that may be no more than maintenance of the status quo while the plaintiff pursues administrative remedies made available by the other substantive portions of Part 17 and the Administrative Procedures Act.

CONCLUSION

The Michigan Legislature responded to its mandate in the 1963 Constitution to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction" by enacting MEPA in 1970. This pioneering legislation recognized the peoples' "primary concern in the interest of [their] health, safety and general welfare" by creating a cause of action that could be claimed by anyone "for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."

MEPA granted broad authority to the courts; in addition to the relief outlined in section 1701, it allows them to recognize available administrative remedies and direct the parties to pursue those, while maintaining jurisdiction for review. It also permitted the executive branch, through the Attorney General, to intervene in any proceedings.

The Legislature was able to create standing for "any person" due to the reservation of an interest in the conservation and development of the state's natural resources by the people in the 1963 Constitution and because the state's sovereignty allows the people to grant so much authority to the branches of government as is not specifically withheld. There is no federal Art III "case" or "controversy" requirement for state court jurisdiction, and therefore standing is not limited by that constitutional precept.

Even if the Court were to resort to the judicial test for standing, that test, as enunciated in *Lujan v Defenders of Wildlife* and developed through later cases, including *Laidlaw*, undoubtedly allows standing to groups whose members can aver that their recreational, aesthetic or economic interests are in jeopardy to bring suit to alleviate that perceived threat before it becomes reality.

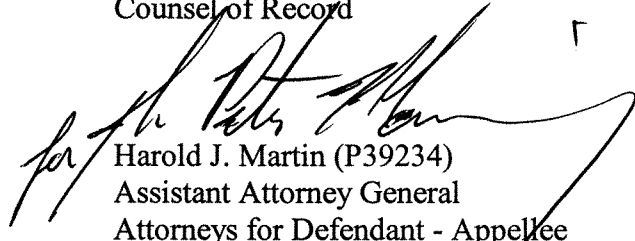
RELIEF

Defendant-Appellee Michigan Department of Environmental Quality asks that this Honorable Court affirm the judgment of the Court of Appeals in this case.

Respectfully submitted,

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